No. 87-180

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In the Supreme Court of the United States

OCTOBER TERM, 1987

ELBERT B. SCHINMANN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners, individuals and corporations who allegedly relied to their detriment on inaccurate federal forecasts of the availability of irrigation water in making decisions concerning their farming businesses, contend that the courts below erred in holding that their claims are barred by the Federal Tort Claims Act's exception for claims "arising out of * * * misrepresentation." 28 U.S.C. 2680(h).

1. The Bureau of Reclamation of the United States Department of the Interior administers the Yakima Project, a federal water resource project in the south-central portion of the State of Washington. The Project diverts, stores, and delivers irrigation waters from the Yakima River, making any necessary allocations in accordance with a consent decree entered in 1945 in *Kittitas Reclamation Dist.* v. *Sunnyside Valley Irrigation Dist.*, Civ. No. 21 (E.D. Wash. Jan. 31, 1945) (Pet. App. A7, A67-A99). In early 1977, Bureau officials were concerned, due to low precipitation levels and the substantially lower than normal level of snow pack in nearby mountains, that the

amount of water available during the 1977 irrigation season would be inadequate (Pet. App. A8). Although the consent decree does not require the Bureau to make advance forecasts of expected shortages and the resulting allocations that may be expected,[1] the Bureau prepared and released such a forecast in February 1977. The forecast stated that the amount of water that would be available would be far lower than normal, which would necessitate allocations under the consent decree and result in a greatly reduced amount of water for many users (*id.* at A8-A9). This projection was revised upward several times during the spring of 1977, however, and ultimately the amount of water available for the year permitted all users to receive amounts equal to all of their prior actual usage (*id.* at A9, A10).

In this action under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680, petitioners allege that the Bureau's projections of available irrigation water were performed negligently and that they were harmed by their reliance on the projections. Specifically, petitioners allege that they took various actions, such as planting fewer or different crops, or drilling wells, to minimize their losses in the face of the expected water shortage, and that those actions were, in retrospect, unnecessary (Pet. 6). After the decision by the Federal Circuit on a parallel claim based on a contract theory (see note 1, *supra*), the United States moved for summary judgment in the present action. In granting that motion (Pet. App. A6-A24), the

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[1] This issue was conclusively decided in prior litigation based on the same events, in which petitioners contended that the United States had a contractual duty to provide accurate advance projections of the amount of irrigation water to be made available. See *H.F. Allen Orchards* v. *United States*, 749 F.2d 1571 (Fed. Cir. 1984), cert. denied, 474 U.S. 818 (1985). The Claims Court and the Federal Circuit held that there was no such contractual duty, either express or implied, and that petitioners' claims may be pursued, if at all, only in the present tort action.

district court held that petitioners' claims are barred by the FTCA's exclusion of claims arising out of misrepresentation (28 U.S.C. 2680(h)) and by its exception for "discretionary function[s]" (28 U.S.C. 2680(a)). The court of appeals, in an unpublished opinion, affirmed on the basis of the misrepresentation exception, accordingly finding it unnecessary to reach the discretionary function issue (Pet. App. A1-A5). The court of appeals recognized that this case "fits squarely into the tort of misrepresentation" because the "essence of [petitioners'] claim is their reliance on the communication of misinformation to their economic detriment" (*id.* at A4).

2. The court of appeals properly applied the FTCA's misrepresentation exception to this case under the principles enunciated by this Court in *United States* v. *Neustadt*, 366 U.S. 696 (1961), and *Block* v. *Neal*, 460 U.S. 289 (1983). In those cases, the Court outlined the scope of the misrepresentation exception and clarified the pivotal role of a plaintiff's reliance on alleged misinformation in determining where the exception applies. In addition, the decision below does not conflict with the decision of any other court of appeals. Accordingly, further review is not warranted.

a. In *Neustadt*, the Court held that the misrepresentation exception applies to negligent, as well as intentional, misrepresentations, and indicated that in assessing the exception's scope courts should look to the elements of the common law tort of negligent misrepresentation (366 U.S. at 706-707). That tort, the Court noted, involved the supplying of " 'information for the guidance of others in their business transactions,' " resulting in " 'harm caused to them by their reliance upon the information' " (*id.* at 706-707 n.16, quoting Restatement of Torts § 552 (1938)). Since the asserted injury in that case had resulted from plaintiffs' reliance on the information in question—a federal inspection and appraisal of a house the plaintiffs

purchased—the Court ruled that the exception barred their claim (366 U.S. at 710-711).

In *Block* v. *Neal, supra*, which also involved a house inspection, the Court reaffirmed the holding of *Neustadt* while declining to expand the exception's scope. In holding in *Block* v. *Neal* that the misrepresentation exception did not bar the plaintiff's claim, the Court noted that the government had undertaken to supervise construction of the house in question and that it had harmed the plaintiff by failing to secure the builder's correction of construction flaws rather than by inducing reliance on the part of the plaintiff. The Court again emphasized that "the essence of an action for misrepresentation * * * is the communication of misinformation on which the recipient relies" (460 U.S. at 296). But in *Block* v. *Neal*, the Court concluded, "unlike *Neustadt*, the Government's misstatements are not essential to plaintiff's negligence claim" (460 U.S. at 297).

As the court of appeals recognized, application of these principles to the present facts is straightforward. As in *Neustadt*, "[t]he essence of the farmers' claim is their reliance on the communication of misinformation to their economic detriment" (Pet. App. A4). According to petitioners' own assertions, their injuries resulted not from any direct effects of the Bureau's actions, but from the fact that the February 1977 forecast was communicated to petitioners and they acted in reliance on it (see Pet. 6).[2]

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[2] Petitioners have attempted to characterize the Bureau's announcement of the forecast as a *"de facto* allocation" of the irrigation water (Pet. 9-10, 18). That is nonsense. Several of the documents submitted by the United States in support of its summary judgment motion show that the Bureau's statements were consistently characterized as "forecasts" and indeed that the Bureau specifically stated that it was making no final allocation. See App. to Gov't Mot. for Summary Judgment, Docs. 11, 12, 18 (July 22, 1985). Petitioners have pointed to no evidentiary basis for their contrary assertion. Moreover, petitioners' argument that an advance forecast of water availability is tantamount to an allocation is belied by their own theory before the

Their claim thus falls squarely within the tort of negligent misrepresentation, and the FTCA's misrepresentation exception therefore bars their claim.

Petitioners' principal argument throughout this case has been that the communication of the forecast to them was only incidental to the underlying "operational" negligence in making the forecast. This argument overlooks, however, the pivotal fact noted by the court of appeals—that, "[b]ut for the communication of the negligent forecast, the farmers would not have suffered injury" (Pet. App. A4). Moreover, an identical argument was advanced and rejected in *Neustadt*, where the Court declined to allow recovery based on "the underlying negligence" of the faulty appraisal (366 U.S. at 704). As both *Neustadt* and the present case demonstrate, misrepresentation claims typically turn not on negligence merely in the act of communicating, but on negligence in the analysis underlying the communication. Thus, what petitioners urge is in fact an unprecedented and unwarranted contraction of the scope of the misrepresentation exception.

b. Contrary to petitioners' assertions (Pet. 11-15), there is no split of circuit authority on the interpretation of the misrepresentation exception. All of the ostensibly conflicting cases either reinforce the distinction drawn by this Court in *Neustadt* and *Block* v. *Neal*, *supra*, or involve issues not presented by this case.

Many of the cases discussed by petitioners are simply based on the distinction between injuries engendered by *plaintiffs' reliance* on misinformation and injuries caused in other ways. Two of the cases they cite, for example,

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Claims Court—that the United States had a distinct duty to provide advance forecasts—and by that court's rejection of that theory, holding that the sole obligation of the United States was to *deliver* the water in accordance with the consent decree's allocation formula. See 749 F.2d at 1574.

involved situations in which actions by meat inspectors directly resulted in losses, one by an erroneous grading that "irrevocably devalued" the meat in the eyes of third parties (*Cross Bros. Meat Packers* v. *United States*, 705 F.2d 682, 684 (3d Cir. 1983)) and the other by inducing third parties to commingle tainted and untainted meat, resulting in the condemnation of all of it (*National Carriers, Inc.* v. *United States*, 755 F.2d 675, 676-677 (8th Cir. 1985)). In neither case did the injury result from actions taken by the plaintiffs in reliance on the government's misstatement, and the courts, applying *Block* v. *Neal, supra*, held the misrepresentation exception inapplicable. Where, on the other hand, the injury from comparable misstatements comes about because of the plaintiff's reliance on them, the misrepresentation exception is applied. See *Carolinas Cotton Growers Ass'n* v. *United States*, 785 F.2d 1195, 1199-1200 (4th Cir. 1986) (applying the misrepresentation exception where plaintiff, in reliance on government's misgrading of cotton, paid an excessive price for it). All in all, these cases merely reaffirm the distinction drawn by this Court in *Neustadt* and *Block* v. *Neal, supra*, and are fully consistent with the court of appeals' decision in the present case.[3]

The other supposedly conflicting cases involved factual situations that differ distinctly from the present case in that the alleged misrepresentations were entirely unrelated to *commercial* decisions made by the plaintiffs, which the

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[3] Other cases cited by petitioners that similarly involved no reliance actions by plaintiffs include *Jimenez-Nieves* v. *United States*, 682 F.2d 1 (1st Cir. 1982), and *Cuesta La Honda Guild* v. *United States*, 685 F.2d 324, 326 (9th Cir. 1982). In *Jimenez-Nieves* the court specifically noted that the "statement was not made to the plaintiff and he did not rely upon it" (682 F.2d at 5). In *Cuesta La Honda Guild* the court recognized that the government "is not liable * * * for injuries resulting from commercial decisions made in reliance on government misrepresentations" (685 F.2d at 325).

Court in *Neustadt* identified as an element of the common law tort of misrepresentation that Congress barred plaintiffs from bringing against the United States (366 U.S. at 706-707 & n.16; see also *Green* v. *United States*, 629 F.2d 581, 585 (9th Cir. 1980)). For example, claims involving medical malpractice (*Ramirez* v. *United States*, 567 F.2d 854 (9th Cir. 1977) (en banc)) and airplane crashes resulting from erroneous weather forecasts or aviation charts (*Ingham* v. *Eastern Air Lines, Inc.*, 373 F.2d 227, 238-239 (2d Cir.), cert. denied, 389 U.S. 931 (1967); *Sullivan* v. *United States*, 299 F. Supp. 621 (N.D. Ala. 1968), aff'd, 411 F.2d 794 (5th Cir. 1969)) have been held not to be barred by the misrepresentation exception. But, as the court in *Ingham* stated, those cases differ from *Neustadt* because *Neustadt* "involved business dealings of a financial or commercial character" and did not "result[] in injuries and deaths" (373 F.2d at 239). The present case, by contrast, involves commercial decision-making plainly within the purview of the common law tort of misrepresentation. Despite petitioners' strained attempts to characterize the present case as noncommercial (Pet. 20-22), the decisions petitioners made in reliance on the Bureau's forecast—decisions whether to plant particular crops, how much to plant, and whether to drill new wells—are unquestionably business decisions that allegedly resulted in commercial (rather than personal) injury.[4]

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[4] Relying on *Krejci* v. *U.S. Army Material Development Readiness Command*, 733 F.2d 1278 (7th Cir.), cert. denied, 469 U.S. 918 (1984) petitioners contend that this case involves noncommercial matters because the government was not acting in the "hope of gain" (Pet. 20-21). Such a restrictive reading of the misrepresentation exception is unwarranted, however, since the government frequently engages in conduct that is regulatory from its standpoint, but which affects private commercial decisions. Indeed, there is no indication that the government in *Neustadt* was attempting to obtain anything of value by means of its representations. In any event, since the *Krejci* court

While the extent to which noncommercial matters may ever trigger the misrepresentation exception remains an open question, and the Court may in the future be presented with a case requiring further delineation of the line between commercial and noncommercial matters for this purpose, the present case falls within the core of commercial matters clearly subject to the misrepresentation exception, and thus presents no issue warranting review by this Court.[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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ultimately held that the circumstances of that case qualified as commercial, its discussion of what kinds of cases might not so qualify must be regarded as dictum.

Petitioners also cite (but do not discuss) *Matthews* v. *United States*, 456 F.2d 395 (5th Cir. 1972). However, the court there merely remanded the case and did not decide whether the misrepresentation exception applied (*id.* at 399), so it hardly conflicts with the decision below.

[5] Petitioners make other arguments that are wholly insubstantial. Petitioners cite, for example, the "special trust relationship" between the Bureau and water users, and urge the importance of resolving the scope of the Bureau's duties (Pet. 19-20). This argument overlooks, however, the basic point that FTCA exceptions are threshold issues which, if decided in the government's favor, preclude any inquiry into the substantive scope of any duties. Similarly, petitioners err in their contention that this Court's decision in *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955), "presents a basis for liability which is outside of all FTCA exceptions" (Pet. 16-17). *Indian Towing* dealt with a question of substantive tort law, the applicability under the FTCA of a state "good samaritan" doctrine. The Court did not address any of the FTCA exceptions in that case. See *United States* v. *S.A. Empresa de Viacao Rio Grandense (Varig Airlines)*, 467 U.S. 797, 812 (1984) (noting that *Indian Towing* did not address the discretionary function exception).

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